APAAC Appeals Seminar
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Prosecutorial Misconduct

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PROSECUTORIAL MISCONDUCT

What Is Prosecutorial Misconduct?
(Courts are not clear on what it is.)

A. ***Fairly clear when tied to a specific constitutional right.***

May not comment on defendant's failure to testify at trial. *Griffin v. California*, 380 U.S. 609 (1965)

May not comment upon *Miranda*-induced silence. *Doyle v. Ohio*, 426 U.S. 610 (1976)

May not comment on post-arrest silence, even if not *Miranda*-induced. *State v. VanWinkle*, 229 Ariz. 233, 273 P.3d 1148 (2012)

May not comment upon defendant's refusal to consent to a search. *State v. Stevens*, 228 Ariz. 411, 267 P.3d 1203 (App 2012)

Must disclose to defense any exculpatory evidence—including impeachment evidence. *Brady v. Maryland*, 373 U.S. 83 (1973) This obligation applies not only to evidence *known* to the prosecutor, but to *any* evidence within the possession of the prosecution office, *or* in the possession of the law enforcement agencie(s) involved in the investigation and/or prosecution of the case. *Kyles v. Whitley*, 514 U.S. 419 (1995).

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B. ***Murky when there is no underlying constitutional right.***

Donnelly v. DeChristoforo, 416 U.S. 637 (1974)
Darden v. Wainwright, 477 U.S. 168 (1986)

A claim of prosecutorial misconduct does not impinge upon any guaranteed constitutional right—other than general "due process."

To constitute a violation of due process, the prosecutor's conduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

"[I]t is not enough that the prosecutor's [actions] are undesirable or even universally condemned."

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Arizona *appears* to follow *Darden* and *DeChristoforo*:

> To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "Reversal on the basis of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985) (quoting *United State v. Blevins*, 555 F.2d 1236, 1240 (5th Cir. 1977))); *see also State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). To determine whether prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct.

State v. Hughes, 193 Ariz. 72, 79, ¶ 26, 969 P.3d 1184, 1191 (1998). BUT, the Arizona Supreme has recently called that into question…

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> In reviewing prosecutorial misconduct claims, we first review each allegation individually for error. *See Roque*, 213 Ariz. at 228 ¶ 154, 141 P.3d at 403. We will find an error harmless if we can say beyond a reasonable doubt that it did not affect the verdict. *See, e.g., State v. Nelson*, 229 Ariz. 180, 189 ¶ 36, 273 P.3d 632, 641, *cert. denied*, ---- U.S. ----, 133 S.Ct. 131, 184 L.Ed.2d 63 (2012). We then consider whether the cumulative effect of individual allegations "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79 ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

State v. Payne, 233 Ariz. 484, 511, ¶ 106, 314 P.3d 1239, 1266 (2013).

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Vouching

There are two types of vouching:

(1) The prosecutor places the prestige of the government behind a witness—normally consists of prosecutor's personal assurance that a witness is reliable or truthful. *State v. Forde*, 233 Ariz. 543, 563, ¶¶ 71–72, 315 P.3d 1200, 1220 (2014):

> During closing argument, the prosecutor addressed the credibility of Gina's identification of Forde as follows:
>
> > What mother would not want to sit up on the stand after you have heard the police had arrested a woman accused of murdering your daughter and say, absolutely that is the woman.
> >
> > But she didn't do that. What she told you was, and I submit to you honestly, was, no, I just can't tell you, I don't know her. I think those were Gina's words. I don't know her. I can't tell you that's the same person, but she looks just like that person.

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Vouching

Forde argues that by using the phrase, "I submit to you honestly," the prosecutor improperly vouched for Gina by placing the prestige of the State behind her. See State v. Vincent, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989)(holding that a prosecutor commits improper vouching by placing the prestige of the government behind a witness).

We agree with Forde that the prosecutor improperly vouched for Gina by conveying his personal belief that she had testified honestly. See State v. Lamar, 205 Ariz. 431, 441 ¶ 54, 72 P.3d 831, 841 (2003). But the misconduct did not result in fundamental error.

To avoid this claim, try to avoid using the pronoun "I" – simply refer to the evidence, i.e., "the evidence establishes that Officer Smith was truthful."

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Vouching

(2) The prosecutor suggests or insinuates that information not presented to the jury supports a witness' testimony or the State's case.

To avoid this claim do not make ambiguous statements, and do not refer to the "charging" process or evidence not admitted at trial. *See State v. Leon*, 190 Ariz. 159, 161-63, 945 P.2d 1290, 1292-94 (1997). Again, *always* tie your argument to the evidence presented at trial.

If you tie your comments to the evidence, you will avoid claims of vouching. Also, stating "the evidence establishes" or "the evidence shows" is much more persuasive than stating "I think," "I believe," or any other first person assertion.

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Rule 15 Disclosure/Brady

If in doubt, *disclose it.*

Obviously, disclose all DRs (may have to redact).

Under *Brady/Kyles*, prosecutor is responsible for *everything* in the possession of the law enforcement agencies involved in the investigation and prosecution of the case. —Imperative to impress upon police that they must turn over to you *everything* arguably related to the case. They do not decide if something is potentially exculpatory—*You do.*

Rule 15.1(f):
Disclosure by Prosecutor. The prosecutor's obligation under this rule extends to material and information in the possession or control of any of the following:
(1) The prosecutor, or members of the prosecutor's staff, or,
(2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or,
(3) Any other person who has participated in the investigation or evaluation of the case and who his under the prosecutor's direction or control.

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Rule 15 Disclosure/Brady

Jail Calls

If you, anybody in your office, *or* anybody in any law enforcement agency involved in the investigation, obtains copies of the defendant's jail calls, they *must* be disclosed to the defense—*even if you do not intend to admit or use them at trial.*

Rule 15.1(b)(2) requires the State to disclose "All statements of the defendant" "[w]ithin the prosecutor's possession or control."

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ER 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

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ER 3.8. Special Responsibilities of a Prosecutor

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected by any applicable privilege;

(2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.

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ER 3.8. Special Responsibilities of a Prosecutor

(g) *when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense* of which the defendant was convicted, the prosecutor *shall:*

(1) *promptly disclose* that evidence to *the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant's counsel or*, if defendant is not represented, *the defendant and the indigent defense appointing authority in the jurisdiction*, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, make *reasonable efforts* to inquire into the matter or to refer the matter to the appropriate law enforcement or prosecutorial agency for its investigation into the matter.

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ER 3.8. Special Responsibilities of a Prosecutor

(h) When a prosecutor knows of *clear and convincing evidence* establishing that a defendant *in the prosecutor's jurisdiction* was convicted of an offense that the defendant did not commit, the prosecutor *shall take appropriate steps*, including giving notice to the victim, to set aside the conviction.

(i) A prosecutor who *concludes in good faith* that information is not subject to subsections (g) or (h) of this Rule does not violate those subsections *even if this conclusion is later determined to have been erroneous.*

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ER 3.8. Special Responsibilities of a Prosecutor
COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simple that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon he basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

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ER 3.8. Special Responsibilities of a Prosecutor

COMMENT

[5] Paragraph (f) supplements ER 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have sever consequence for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with ER 3.6 (b) or (c).

[6] Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] *Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently*

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QUESTIONS???

PETITIONS AND CROSS-PETITIONS FOR REVIEW

Rule 31.19:

> **a. Time for Filing; Cross-Petition; Extension of Time.** Within 30 days after the Court of Appeals issues its decision, any party may file a petition for review with the clerk of the Supreme Court; provided that, if a motion for reconsideration has been filed, a petition for review may be filed within 15 days after the final disposition of the motion. A cross-petition for review may be filed with the clerk of the Supreme Court within 15 days after service of a petition for review. Motions to extend the time to file a petition for review shall be filed in the Supreme Court.
>
> **c. Form, Length and Contents.** . . .
>
> The petition shall contain concise statements of the following:
>
> . . .
>
> 3. The reasons the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

A. Reasons to Seek Review (In descending order of importance—*published* opinions *always* take precedence):

1. Clear legal conflict between panels of the court of appeals.

2. Clear legal conflict with an Arizona Supreme Court opinion.

3. Clear conflict between a recent United States Supreme Court opinion and a previous Arizona Supreme Court opinion.

4. Conflict with an older United States Supreme Court opinion.

5. An important legal issue of first impression (particularly interpretation of a statute) was wrongly decided.

6. A *clear* legal error that is not fact-bound (particularly if it is likely to reoccur *or* evade review).

7. The court of appeals misapplied the law to the facts of the case (*highly* unlikely the court will take it—unless a high profile or important case, but even then only a remote chance).

B. Reasons to Persuade the Court to Deny Review:

1) Unpublished decision.

2) Decision is extremely fact-bound.

3) There is no conflict with other decisions of the court of appeals or the Arizona or United States Supreme Courts.

4) There are alternative grounds to affirm the conviction or sentence (i.e., the evidence was admissible on a ground not reached by the court of appeals).

5) The court of appeals correctly resolved the legal issue.

6) Any possible error would be harmless under the facts and circumstances of the case.

7) The issue is unlikely to re-occur and the supreme court need not take the case.

Defense Interview Disclosure Requirement

Defendant's required disclosure is not very extensive or thorough under Rule 15. It has been expanded over time to promote the truth-seeking process.

Jones v. Superior Court of Nevada Cnty., 58 Cal. 2d 56, 58, 372 P.2d 919, 920 (1962):

The first sign that the prosecution constitutionally could obtain some disclosure of the defendant's case before trial--discovery is designed to ascertain the truth in criminal as well as in civil cases.

Williams v. Florida, 399 U.S. 78, 82 (1970):

Upholding a Florida law requiring alibi disclosure by the defendant-- The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Nevertheless, the best way to get something substantive is to request it under 15.2 (g) and show substantial need.

Rule 15.2(g):

Disclosure by Order of the Court. Upon motion of the prosecutor showing that the prosecutor has substantial need in the preparation of his or her case for material or information not otherwise covered by Rule 15.2, that the prosecutor is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to the prosecutor. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

Last year in ***Wells v. Fell***, the defendant interviewed the State's witnesses without any notice to the State, and the State had no opportunity to be present and to hear what they said or to record it. When the State requested a recorded copy of the interview, the defendant declined but offered to trade for an interview with the victim. The State requested the disclosure from the trial court, and the trial court ordered it. *Wells v. Fell*, 231 Ariz. 525, 297 P.3d 931 (App. 2013).

Facts of *Wells*

Wells was charged with two counts of aggravated assault, for assaulting a police officer with a dangerous instrument. Unbeknownst to the prosecutor, defense counsel interviewed some of the police-officer witnesses, arranging the interviews directly with TPD. The State learned of the interviews after Wells attempted to interview the victim officer. The State moved for disclosure of recordings or transcripts of the interviews, arguing that it had substantial need of the recordings or transcripts "to see if there [is] any additional or different information in the police reports."

Wells relied on *Osborne v. Superior Court*, 157 Ariz. 2, 754 P.2d 331 (App. 1988), to argue that, because he intended to use the officers' statements only for impeachment, he was not required to disclose them. The trial court granted the State's motion for disclosure, finding that it could not obtain the "substantial equivalent" of the recordings because "obviously if the State interviews the police officers that have been interviewed they can't remember exactly what they said, and so the State wouldn't be prepared should [Wells] use the interviews for impeachment."

Wells filed a petition for special action challenging the order. On special action, he relied on *Osborne* to argue that a defendant need not disclose any statements that State witnesses made to the defense if they are to be used solely for impeachment. Because he planned to use the statements only for impeachment, he said, the trial court erred in ordering him to disclose them.

Background

In *Osborne v. Superior Court*, 157 Ariz. 2, 754 P.2d 331 (App. 1988), the trial court ordered the defendant to disclose to the State three categories of records: 1) the statements of state witnesses who had been interviewed in the presence of the prosecutor, 2) the statements of witnesses disclosed by the state who had been interviewed outside the presence of the prosecutor, and 3) tape recordings of a prison disciplinary hearing which was attended by defense counsel but not by counsel for the State. He sought special action relief.

The Court of Appeals began by looking at Rule 15.2(c) and held that it required a defendant to disclose statements only of witnesses he or she will "call as witnesses at trial" and "papers, documents, photographs and other tangible objects" that he or she will use at trial. The court thus reasoned that the Rule did not require disclosure of any of the statements because the defendant wished to use them solely for impeachment and because they were "testimonial" rather than "real" evidence.

Next, the court held that Rule 15.2(g) did not support the trial court's order. That subsection provides that, if the prosecutor can show "substantial need in the preparation of his or her case for material or information not otherwise covered by Rule 15.2, that the prosecutor is unable without undue hardship to obtain the substantial equivalent by other means," then the court may order a person to make the material available. The *Osborne* court concluded that the state had not demonstrated undue hardship. The State had or could have had the same opportunity to record or transcribe the statements made when the prosecutor was present or at the disciplinary hearing and that "[t]he expense to the state of transcription does not amount to 'undue hardship.'" The court stated that, "[w]ith respect to all of the statements," the State would "have the opportunity to review them and make . . . objections as to accuracy and context if and when they are used by petitioner to impeach the state's witnesses."

Back to *Wells*

The Court of Appeals first disagreed with this broad reading of *Osborne*. It explained that, in *Osborne*, it stated that the disclosure of statements for impeachment is governed by Evidence Rule 613(a) and that "[t]he mere possibility that such statements may be used and may be inaccurate or taken out of context does not justify a blanket order requiring disclosure of all statements not otherwise covered by Rule 15.2." In doing so, the *Osborne* court focused its analysis on whether the State had met the requirements of Rule 15.2(g). The *Osborne* decision did not say whether the prosecutor was notified of, or had any opportunity to attend, the interviews at which she was not present. In *Wells*, the parties agreed that the defendant did not notify the State about the interviews.

Wells argued that, by arranging the interviews with the police department, he had notified the "State." The court disagreed, noting that, under Rule 15.1, "[a] prosecutor is responsible" for disclosing materials from law enforcement agencies that are under the prosecutor's direction or control. The Rule "therefore anticipates that the prosecutor will control the discovery process," and does not provide that those other agencies may act as an "agent" or "representative" of the State for disclosure purposes.

Underlying Prinicple

The court then went on to note that it rejected a similar claim in *Carpenter v. Superior Court*, 176 Ariz. 486, 862 P.2d 246 (App. 1993). In *Carpenter*, the defendant tried subpoena the police custodian of records without notifying the State. The trial court quashed the subpoena and the Court of Appeals affirmed. It agreed with the trial court's conclusion "that a criminal defendant cannot use the subpoena power of the court to circumvent the rules of criminal procedure and thereby obtain discovery without the knowledge of the state or consent of the trial court." While the facts were different in *Wells*, the fact that the prosecutor did not have an opportunity to attend the interviews was significant to the court in determining whether the state could establish an undue hardship under the Rule.

Shift in the Zeitgeist

While *Osborne* was distinguishable from *Wells*, the court "recognize[d] that some of the language therein more broadly asserts that impeachment evidence is not subject to court-ordered disclosure under Rule 15.2(g)," and overruled it "[t]o the extent that *Osborne* can be so read."

The court described its reasons for overruling *Osborne*.

First, the process of discovery has been expanded and become increasingly more open in recent years, and "trial by ambush a tactic no longer countenanced in Arizona courts." Indeed, "[t]he underlying principle of our disclosure rules is the avoidance of undue delay or surprise." To that end, "[t]he object of discovery is to assist the search for truth by providing the parties with all the evidence possible so that the crucial facts may be presented at trial and a just decision made." Even though Rule 15 does not require its disclosure, the court saw "no reason to preclude a court from ordering the disclosure of impeachment evidence if a party makes the appropriate showing of substantial need for the evidence and undue hardship in obtaining it by other means."

Where there is overlap, there can be no mutual exclusion

The court also noted that our supreme court had rejected a claim that impeachment evidence should be distinguished from evidence intended for use in a case-in-chief, quoting the court's conclusion that the civil rules "do not give immunity to evidence because it may be used for impeachment purposes." *Zimmerman v. Superior Court*, 98 Ariz. 85, 92, 402 P.2d 212, 217 (1965). Nothing in Evidence Rule 613 prohibits a trial court from ordering disclosure of impeachment evidence before trial. That rule merely provides that when examining a witness, a party must "show" or "disclose" the contents of a witness's prior statement "to an adverse party's attorney." Finally, impeachment evidence may also be substantive evidence, so shielding it from disclosure based on its label "is problematic."

Court's conclusion

The court concluded that, "[b]ecause allowing a court to order disclosure of witness statements intended for impeachment advances the purposes of the discovery rules and the ongoing efforts made by our courts to ensure fair trials aimed at determining the truth, we hold that such statements may be ordered disclosed under Rule 15.2(g) in appropriate cases."

What Makes a **Good** State's Appeal?

Presented by Jacob R. Lines and Nicolette H. Kneup
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So, you think you want to appeal an unfavorable ruling. But you don't know if it will be a good appeal. We like to start with three questions.

1) Why was the judge wrong?
Specifically identify what the judge ruled, why he or she ruled that way, and why you believe it is incorrect. Is it a question of fact? For example, did the judge accept the Defendant's version of events rather than the officer's version of event? Is it a question of law? For example, did the judge disagree with us about how to interpret a statute or rule or case? This makes a big difference because of the standard of review that will be employed.

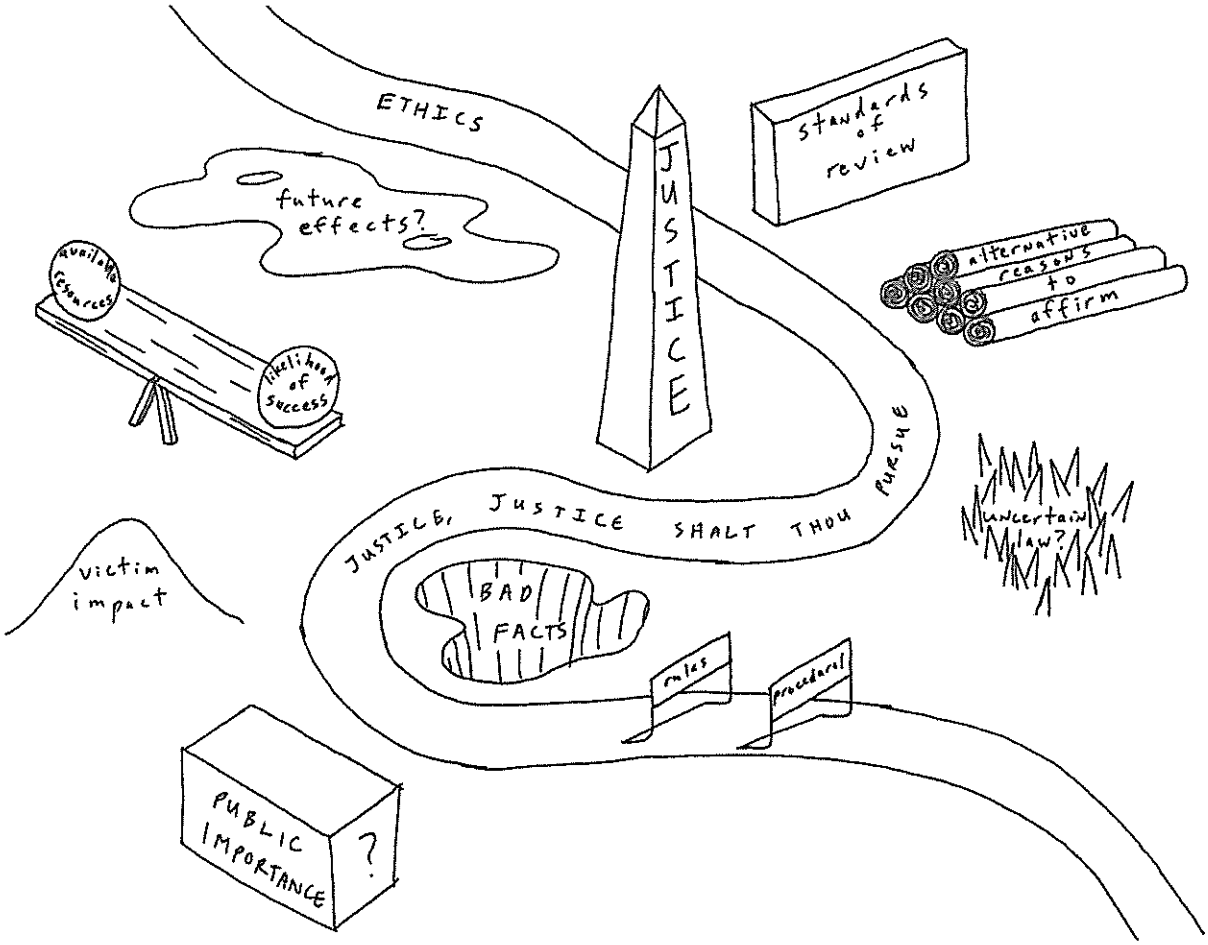
2) What facts are necessary for your argument?
For example, for an argument that a piece of evidence was seized legally because it was in plain view, we need facts about the officer being in the place legally and about the evidentiary value of the evidence being immediately apparent.

3) Where are those facts in the record?
What is "the record"? Look at Rule 31.8(a)(1), and you will see that it is basically the court's file plus transcripts. So, if the facts that we need for the argument are not in the pleadings or presented in an evidentiary hearing, we have a problem.

Appeal or Special Action?

Not everything is appealable. The State's right to appeal is strictly limited to constitutional or statutory provisions that clearly grant that right. *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990); *State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 340, 767 P.2d 226, 227 (App. 1989), *citing State v. Lelevier*, 116 Ariz. 37, 567 P.2d 783 (1977). Our appeals statute is A.R.S. § 13-4032. If it isn't in the statute, then we can't appeal it. You might think about a special action instead. *See State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App. 2008).

<u>Should</u> we appeal this?
Once you figure out that you can appeal something, the question becomes whether you should appeal it. Here are a few of the factors that we consider when deciding whether to appeal:



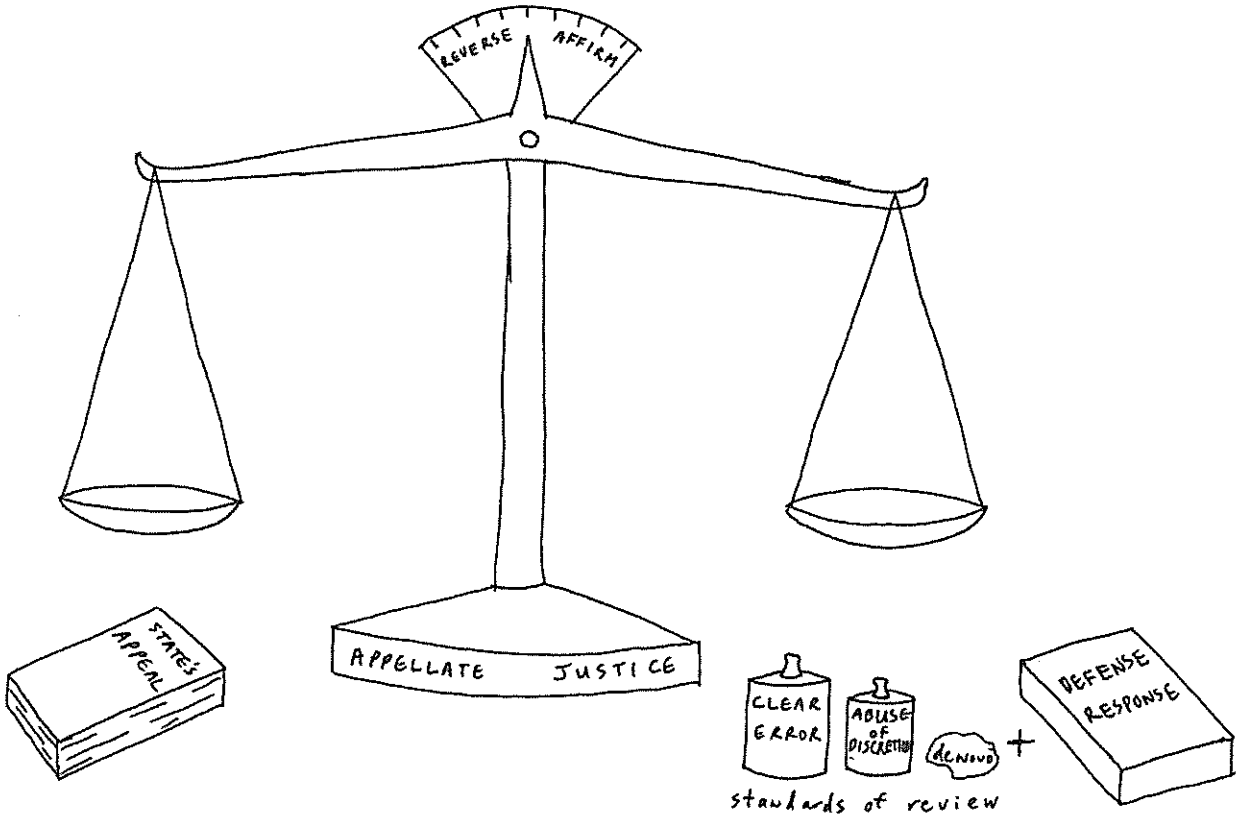
What makes a good appeal? Examples?

What makes a good brief?

The bare minimum for a brief is found in Rule 31.13(c). It includes the table of contents, table of citations, statement of facts (WITH citations to the record), issues presented, and argument. A good brief has more. Some limited advice:

- Don't be limited by the structure set out in the Rule. Follow the rules, but spend time crafting a structure that will lead the court to the correct conclusion.
- Tell a story. The most compelling story often wins.
- Remember your audience. It is a panel of dispassionate judges, not a jury.
- Remember your standard of review. This is the question the judges will be asking. In other words, they will not be asking, "Was the State right about this argument?" They will be asking, "Can the State prove from this record that the trial court was wrong to rule like this?"
- Keep it short.
- If it is a fact-intensive question, don't assume the court will find everything important in the record. Cite the record closely, page by page, line by line, to show why the facts

support you. Remember, you are trying to overcome the disadvantage of having lost below, so you need to cite chapter and verse every time you talk about the facts.



Questions of law, such as interpretation of constitution, statute, or rule, are reviewed de novo. *State v. Nichols*, 224 Ariz. 569, 572, ¶ 12, 233 P.3d 1148, 1151 (App. 2010); *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 7, 210 P.3d 1283, 1285 (App. 2009); *State v. Kelly*, 210 Ariz. 460, 461, ¶ 3, 112 P.3d 682, 683 (App. 2005).

A motion to dismiss is reviewed for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004).

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, 81, ¶ 25, 235 P.3d 227, 234 (2010); *State v. Tucker*, 205 Ariz. 157, 165, 68 P.3d 110, 118 (2003); *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995).

Motions to suppress are reviewed for an abuse of discretion, deferring to the trial court's factual findings but reviewing the legal conclusions de novo. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004).

Findings of fact are upheld unless they are "clearly erroneous." *State v. Burr*, 126 Ariz. 338, 339, 615 P.2d 635, 636 (1980).